

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In Re:	§	Case No. 21-31811
	§	
1917 Heights Hospital, LLC	§	(Chapter 11)
	§	
Debtor.	§	

**DEBTOR’S MOTION FOR AUTHORITY TO SELL PROPERTY
OF THE ESTATE FREE AND CLEAR PURSUANT TO 11 U.S.C. § 363(b)
AND TO ASSUME AND ASSIGN LEASES PURSUANT TO 11 U.S.C. § 365**

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS MOTION WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

TO THE HONORABLE EDUARDO V. RODRIGUEZ, UNITED STATES BANKRUPTCY JUDGE:

1917 Heights Hospital, LLC, the debtor-in-possession in the above-captioned bankruptcy case (the “Debtor”) files this, its *Motion for Authority to Sell Property of the Estate Free and Clear Pursuant to 11 U.S.C. §363(b) and to Assume and Assign Leases Pursuant to 11 U.S.C. § 365* (the “Motion”), and shows:

RELIEF REQUESTED

1. After good faith negotiations, the Debtor entered into the Purchase and Sales Agreement, together with all addendums (collectively, the “Contract”) to sell the medical professional building located at 1917 Ashland Street, Houston Texas 77008 (the “Building”) to Platinum Heights, LLC (“Purchaser”) for the purchase price of \$38,688,485.39 (the “Purchase Price”). In an effort to generate sufficient funds from the sale to make an anticipated meaningful distribution to general unsecured creditors pursuant to a subsequently to be filed plan and disclosure statement, the Contract contains a “true-up” provision whereas post-closing of the sale, the Purchaser may be required to pay additional funds into the bankruptcy estate or alternatively may receive a refund of some portion of the Purchase Price depending upon the ultimate allowed claims in the case. The Debtor seeks authority to sell the Building pursuant to the Contract. The Debtor asserts that granting the relief requested herein is proper.

JURISDICTION, VENUE AND STATUTORY PREDICATE

2. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334, and venue of the Debtor’s chapter 11 case in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief sought herein are §§ 105, 361, 362, 363, 364, and 365 of the Bankruptcy Code and Rules 4001, 6004, 6006, and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). This is a core proceeding as it concerns the sale of property of the Debtor’s bankruptcy estate.

BACKGROUND

4. On June 1, 2021 (the “Petition Date”), the Debtor filed its voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the “Bankruptcy Code”).

5. The Debtor remains in possession of its property and is operating its business as debtor-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code. No committee has been appointed in the Debtor’s case at this time.

6. The Debtor owns the Building, which is commercial real estate property located at 1917 Ashland Street, Houston Texas 77008 comprised of a multi-story medical professional building, the adjacent parking facility, and surrounding grounds.

7. The asserted primary secured creditor took possession of the Building in December of 2020 *after* the underlying loan obligations matured and has since operated the Building employing a management company. Such asserted secured creditor is not a “true lender” of the Debtor, but rather is an entity that purports to have acquired the rights of the Debtor’s “true lender” as an end run to purchase the Building and related property through a foreclosure sale at a deeply discounted price to the detriment of the Debtor’s other creditors. The proposed sale seeks to preserve the Debtor’s value in its assets for the benefit of its creditors. As such, the Debtor has made the proper determination in its business judgment to sell to Purchaser. Such sale is in the best interest of the Debtor, its bankruptcy estate, and its creditors. Approval is proper.

8. Moreover, the Purchaser is not an insider of the Debtor and is believed to be a true-third party purchaser. Based upon the post-closing true-up discussed below and contained in the Contact, the proposed sale is the Debtor’s best current option to generate sufficient funds to make a meaningful distribution to general unsecured creditor holding allowed claims. Approval is proper.

ARGUMENT AND AUTHORITIES

A. The Sale

9. Section 363 of the Bankruptcy Code authorizes a debtor-in-possession to use or sell property of the estate other than in the ordinary course of business, free and clear of liens, claims, encumbrances and other interests, and states in pertinent part:

(b)(1) The trustee [debtor-in-possession], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate...

Section 363(b)(1); Bankruptcy Rule 6004(f)(1) (“all sales not in the ordinary course of business may be by private sale or by public auction”).

10. The Debtor moves the Court to approve the sale of the property free and clear of liens, claims, encumbrances, and other interests pursuant to § 363(b) of the Bankruptcy Code. Such property consists of the Building, improvements, and personal property owned by the Debtor and located at 1917 Ashland Street, Houston Texas 77008 as more fully described and defined in the Contract attached hereto as **Exhibit “A”** and incorporated by reference herein for all intents and purposes. The full terms of the purchase offer are included in the Contract. The total purchase price under the Contract is \$38,688,485.39, subject to the post-closing true-up. The post-closing true-up is detailed in the Second Addendum to the Contract and seeks to create a process to generate sufficient funds from the sale to cause the Debtor to have sufficient funds to pay all allowed secured claims in full, all allowed administrative claims in full, all allowed unsecured priority claims in full and to make a very meaningful distribution to holders of allowed general unsecured claims.

11. It is presently anticipated that the post-closing true-up may likely result in one of three possible outcomes – (i) the ultimately allowed claims against the Debtor are less than the purchase price paid at closing and the Purchaser would receive a refund of that difference; (ii) the

ultimately allowed claims against the Debtor are more than the purchase price paid at closing and the Purchaser must pay additional funds to the Debtor of that difference; (iii) the ultimately allowed claims against the Debtor are in the exact same dollar amount as the fixed purchase price paid at closing and no additional money is owed to or from either Party.

12. Debtor represents that Purchaser negotiated the Contract and Purchaser is purchasing the property in good faith, and, therefore, is entitled to the protections of Section 363(m) of the Bankruptcy Code.

13. To date, Purchaser has made the highest and best offer. The Debtor reserves the right to negotiate back-up offers.

14. The Debtor presently intends to file timely a disclosure statement and plan. It is also presently anticipated that the sales proceeds to be received from the sale will be distributed through a chapter 11 plan. The proposed sale (including its post-closing true-up) is neither a sub rosa plan nor offends Section 1101 of the Bankruptcy Code. Granting approval of the sale is proper.

15. Moreover, the Debtor has provided accurate and reasonable notice of the proposed sale to all creditors and parties in interest, has reasonably determined in its business judgment that the proposed sale is proper, the Purchase Price is fair and reasonable and is anticipated to allow a meaningful distribution in a subsequently to be filed plan and disclosure statement.

16. The Debtor seeks authority to consummate the sale as set forth in the Contract. The sale is “as is, where is”, with no representations or warranties of any kind whether express or implied. The sale is also free and clear of all liens, claims, interest, and other certain encumbrances (collectively, the “Encumbrances”) in accordance with § 363(f) of the Bankruptcy Code with any liens attaching to the sales proceeds. Section 363(f) of the Bankruptcy Code authorizes a debtor-in-

possession to sell assets free and clear of Encumbrances in property of an entity other than the estate if:

- (a) applicable nonbankruptcy law permits a sale of such property free and clear of such interest;
- (b) such entity consents;
- (c) such interest is a lien and the price at which such property is to be sold is greater than the value of all liens on such property;
- (d) such interest is in *bona fide* dispute; or
- (e) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. 11 U.S.C. § 363(f).

See 11 U.S.C. § 363(f).

17. Because § 363(f) of the Bankruptcy Code is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to permit the Sale “free and clear” of the Encumbrances. *In re Wolverine Radio Co.*, 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (stating that § 363(f) is written in the disjunctive and holding that the Court may approve the sale “free and clear” provided at least one of the subsections is met); *In re Dundee Equity Corp.*, No. 89-10233, 1992 WL 53743, at *4 (Bankr. S.D.N.Y. Mar. 6, 1992) (“Section 363(f) is in the disjunctive, such that the sale free of the interest concerned may occur if any one of the conditions of § 363(f) have been met” (citations omitted)). Even if § 363(f) was inapplicable to the instant case, the Court may also authorize the sale of a debtor’s assets free and clear of any liens pursuant to § 105 of the Bankruptcy Code. *In re Trans World Airlines Inc.*, No. 01-0056(PJW), 2001 WL 1820325, at *3 (Bankr. D. Del. Mar. 27, 2001) (“bankruptcy courts have long had the authority to authorize the sale of estate assets free and clear even in the absence of § 363(f)” (citations omitted)); *In re White Motor Credit Corp.*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) (“Authority to conduct such sales [free and clear of liens] is within the Court’s equitable powers when necessary to carry out the

provisions of Title 11.” (citations omitted)). The Debtor asserts that one or more of the subsections of § 363(f) is satisfied. Specifically, the Debtor asserts that the holders of all Encumbrances could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

B. The Assumption and Assignment of Leases.

18. As part of proposed sale, the Debtor will assume and assign certain commercial leases associated with the Building (the “Leases”) all as more fully described and defined in the Contract, and it is believed that the only lease is with the tenant CuraHealth.

19. Section 365 of the Bankruptcy Code authorizes debtors in possession to assume executory contracts or unexpired leases subject to the Court’s approval and requires such debtors in possession to satisfy certain requirements at the time of assumption. Under § 365(a) of the Bankruptcy Code, a debtor, “subject to the Court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” Section 365(b) of the Bankruptcy Code, in turn, codifies the requirements for assuming an expired lease or executory contract of a debtor, providing in relevant part that:

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee [debtor-in-possession] may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –

- (A) cures, *or* provides adequate assurance that the trustee [debtor-in-possession] will promptly cure, such default ...
- (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a part other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
- (C) provides adequate assurance of future performance under such contract or lease.

See 11 U.S.C. § 365(b)(1).

20. Courts evaluate a decision to assume an executory contract under the “business judgment” standard. *Richmond Leasing Co. v Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985); *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1046 (4th Cir. 1985); *In re Federated Dept. Stores, Inc.*, 131 B.R. 808, 811 (S.D. Ohio 1991) (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984)). This standard is satisfied if the debtor determines in its business judgment that the assumption of the contract or lease would benefit the estate. *Richmond Leasing Co.*, 762 F.2d at 1309 (“As long as assumption of a lease appears to enhance a debtor’s estate, court approval of a debtor-in possession’s decision to assume the lease should only be withheld if the debtor’s judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code.” (citations omitted)). The business judgment standard requires that the Court approve the debtor’s business decision unless that judgment is the product of bad faith, whim, or caprice. *Lubrizol Enters.*, 756 F.2d at 1046 and 1048.

21. The Debtor’s proposed assumption and assignment of the Leases to Purchaser satisfies the business judgment standard and the requirements of Section 365 of the Bankruptcy Code. As discussed above, sale will provide significant benefits to the Debtor, its bankruptcy estate, and its creditors.

22. A debtor-in-possession may assign an executory contract or an unexpired lease of the debtor if it: (i) assumes the agreement in accordance with § 365(a) of the Bankruptcy Code; and (ii) provides adequate assurance of future performance by the assignee. 11 U.S.C. § 365(f)(2). Significantly, among other things, adequate assurance may be provided by demonstrating the assignee’s financial health and experience in managing the type of enterprise or property assigned. *In re Bygaph, Inc.*, 56 B.R. 596, 605–06 (Bankr. S.D.N.Y. 1986) (stating that adequate assurance of future performance is present when the prospective assignee of lease from the debtor has financial

resources and has expressed willingness to devote sufficient funding to the business to give it a strong likelihood of succeeding). Upon reasonable request, the Debtor will require Purchaser to provide evidence constituting adequate assurance of future performance to be provided to the counterparties to the Leases.

C. Waiver of the 14-Day Stay is Proper.

23. The purpose of Bankruptcy Rules 6004(h) and 6006(d) are to provide sufficient time for an objecting party to appeal before an order can be implemented. Although Bankruptcy Rules 6004(h) and 6006(d) and the Advisory Committee Notes are silent as to when a court should “order otherwise” and eliminate or reduce the 14-day stay period, the leading treatise on bankruptcy suggests that the 14-day stay period should be eliminated to allow a sale or other transaction to close immediately “where there has been no objection to the procedure.” 10 COLLIER ON BANKRUPTCY ¶ 6004.11 (Richard Levin and Henry J. Sommer eds., 16th Rev. Ed. 2020). Further, Collier suggests that if an objection is filed and overruled, and the objecting party informs the Court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to file such appeal. *Id.*

24. To maximize the value and benefit to the Debtor and its estate, the Debtor seeks to close the sale as soon as possible. Accordingly, the Debtor hereby requests that the Court waive the 14-day stay period under Bankruptcy Rules 6004(h) and 6006(d) or, in the alternative, if an objection to the sale is filed, reduce the stay period to the minimum amount of time needed by the objecting party to file its appeal.

CONCLUSION

WHEREFORE, Debtor moves the Court for an order: (i) permitting the sale free and clear of all liens and other interests of the property covered by the Contract attached hereto as **Exhibit “A”**;

(ii) approving the terms of the Contract and permitting the Debtor to close such sale in accordance with the terms of the Contract, to pay any and all customary and normal closing fees and costs at closing, if any; (iii) having all valid liens and other interests which may be attributable to the property sold attach only to the proceeds of such sale, (iv) providing for the assumption and assignment of all Leases and as described in the Contract; (v) waiving any stay period provided by Bankruptcy Rules 6004(h) and 6006(d); and (vi) for any such other relief as to which the Debtor may be entitled.

DATED July 22, 2021.

Respectfully submitted,

/s/ Steven Shurn
Steven Shurn TBN 24013507
sshurn@hwa.com
HUGHESWATTERSASKANASE, LLP
Total Plaza
1201 Louisiana, 28th Floor
Houston, Texas 77002
(713) 759-0818 Telephone
(713) 759-6834 Facsimile
(713) 410-2139 Cell Phone

COUNSEL FOR DEBTOR-IN-POSSESSION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Motion* has been served on all parties in interest listed on the attached “Service List” by either electronic means via the Court’s CM/ECF system or otherwise by U.S. first class mail postage prepaid on July 22, 2021.

/s/ Steven Shurn

Steven Shurn